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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-282

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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CARL JAY YOW, *Petitioner,*

v.

AMERICAN HOME ASSURANCE COMPANY,
a New York Corporation, *Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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T. KEISTER GREER
110 Maple Avenue
Rocky Mount, Virginia 24151
(703) 483-5149
*Counsel of Record*

*Of Counsel*:

WILLIAM N. ALEXANDER, II
GREER & ALEXANDER

August, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

## THE QUESTION PRESENTED

Should this Court exercise its supervisory power where a United States District Court has rendered judgment on a fraud claim without making the findings of fact required by Rule 52, and a United States Court of Appeals has sanctioned that failure?

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Petitioner Carl Jay Yow prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on May 28, 1980. The decision affirmed a judgment of the United States District Court for the Eastern District of Virginia.

## OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia was not reported. The opinion of the United States Court of Appeals for the Fourth Circuit was not reported. Both opinions are appended to this petition.

## JURISDICTION

The judgment of the United States Court of Appeals was entered May 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 52, F.R.C.P. [Text appended hereto].

## STATEMENT OF THE CASE

The Reverend Carl Jay Yow, a Methodist minister, suffered the loss of his left hand on March 16, 1976 in a wood-working accident in his home. Mr. Yow was covered by a group accident policy issued by the respondent American Home Assurance Company to methodist ministers. That policy provided $150,000 for loss of a hand.

Mr. Yow had been induced to subscribe to this group coverage by an extensive brochure[1] prepared by the insurance company. After receiving Mr. Yow's claim, the insurance company wrote him that there was a provision in his policy that the injury must result from an accident "directly and independently of all other causes", and that there were therefore no benefits payable.[2] Mr. Yow's accident had been caused by a dizzy spell, in the course of which he fell into a table saw. The insurance company claimed that injury from an accident caused by a dizzy spell did not result "directly and independently of all other causes." That language had not been in the brochure prepared by the insurance

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[1] The brochure was Exhibit 22 in the record before the United States District Court.

[2] The letter was plaintiff's Exhibit 23.

company, and upon which Mr. Yow based his decision to subscribe.

When more than two years had gone by without payment Mr. Yow filed a diversity action in the United States District Court for the Eastern District of Virginia. The first cause of action was for fraud and deceit, it being alleged that the insurer had induced Mr. Yow to subscribe by the brochure, that the company had represented to Mr. Yow that it intended to pay an indemnity in the event of loss, that that representation was false, and known by the company to be false; that the insurer intended that Mr. Yow should act upon its representation; and that he did in fact rely thereupon, to his injury.[3]

The insurance company, heedless of the disparity between brochure and policy, defended the case on the policy language:

> "As alleged in its answer, defendant has no obligation to plaintiff under its policy of insurance due to the fact that the loss of plaintiff's hand is conceded to have been the result of a 'dizzy spell', and did not therefore result 'directly and independently of all other causes.' "[4]

The case was submitted to the District Court on a record consisting of eleven depositions and over one hundred exhibits. Trial by jury was waived except as to tort damages, should the Court find for Mr. Yow.

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[3] The complaint also included counts for intentional infliction of emotional distress, conversion of funds by a fiduciary, bad faith conduct by an insurer, and a count on the contract itself.

[4] Appendix below, page 15. The record is replete with the language.

The District Court ruled that Mr. Yow was entitled to his policy benefits:

> "Indeed, it is the Court's view that the loss suffered would uniformly be found compensable among the United States and in Great Britain."[5]

The District Court denied any tort recovery, and made findings on the count for bad faith refusual to pay benefits. No findings were made on the fraud count. The Court gave judgment for the insurance company on the count, but did not discuss it. No finding was made on the variance between brochure and policy, and the brochure was not mentioned.

The District Court made only the following elliptical comment on plaintiff's fraud count:

> ". . .[T]he Court considers it only of academic interest (if that) to discuss and compare the several theories plaintiff advances to support tort recovery. Had plaintiff filed this action in a Virginia court such a discussion by the Court would have been of substantial value, especially on appeal to the Supreme Court of Virginia."[6]

The insurance company paid Mr. Yow $150,000 in benefits on August 17, 1979, well over three years after his accident. This sum was accompanied with interest at the rate of 6%.[7]

Mr. Yow appealed the denial of tort recovery, with emphasis on the claim of having been defrauded. The failure of the District Court to make findings as to the

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[5] Appendix, p. 5a. The Court's findings and conclusions were stated in its opinion. Rule 52(a).

[6] Appendix, p. 7a.

[7] The insurer took no appeal from that portion of the judgment awarding plaintiff his insurance benefits.

fraud count was pointed out to the Court of Appeals, and that court was asked to notice the fraud on the face of the documentary record. The Court of Appeals affirmed, saying:

> "The district court held that the insurance company was liable for the face amount of the contract, but that the facts did not warrant a finding of liability under plaintiff's various tort claims. The district court's factual findings were not clearly erroneous and we find no error in the application of Virginia law to those facts. The facts found by the district court simply do not warrant an award of exemplary or punitive damages."

The difficulty, however, was that the District Court had *not* made findings as to Mr. Yow's first claim for relief, for fraud, but had nevertheless rendered judgment against him on the count:

> "Judgment must enter for defendant on counts one, two, three, and four of the complaint. Judgment shall enter for plaintiff on count five insofar as count five seeks damages under the contract. Plaintiff shall recover his costs. An appropriate order shall issue."[1]

## REASONS FOR GRANTING THE WRIT

Under the first count of the complaint, which was entitled "Fraud and Deceit," the District Court could have made the following findings:

1. Mr. Yow was induced to subscribe to the group policy by a detailed brochure describing the coverage which was prepared by the insurance company.

2. When Mr. Yow subsequently received his certificate of insurance, it included restrictive language

[1] Appendix, p. 8a.

stating that injury must result from an accident "directly and independently of all other causes." That language was not in the brochure.

3. When the insurance company submitted Mr. Yow's claim to outside counsel for review, it asked for an opinion based upon the language "directly and independently of all other causes," but did not disclose to counsel that the brochure given Mr. Yow did not contain that language.

The materiality of the variance between brochure and policy is apparent from the insurance company's reliance on it. The courts have also spoken on the materiality of the restriction. The following statement was made in *Kievit* v. *Loyal Protective Life Insurance Company,* 34 N. J. 475, 170 A.2d 22 (1961):

> "See Richards, supra, p. 7 where the author notes that the common clause to the effect that the death or disability must result from accident "independently of all other causes" would, if taken literally, be so unreasonable and repugnant to the main purpose of the policy 'that the courts construe it very strictly against the insurers, and sometimes really seem to disregard it altogether.' " [170 A.2d at 26, 27].

A similar statement appears in the opinion in *Carlson* v. *New York Life Insurance Company,* 76 Ill. App.2d 187, 222 N.E.2d 363 (1966):

> "As stated in the original opinion, if the policy is to be construed in such manner that in order to recover, the disability must result from an accidental injury solely, exclusively and totally independent of any other factor, there would be only a rare incident of coverage." [222 N.E.2d at 372].

It is well settled that in case of variance between brochure and policy, the brochure controls. See the

language from *Lewis* v. *Continental Life and Accident Co.*, 93 Idaho 348, 461 P.2d 243, 36 A.L.R. 3rd 529 (1969):

> "This handbook explained coverage under the program in clear, informal and easily read English. It was expected that employees would read and rely easily upon this booklet. And the company did or at least should have known that if an employee wished to determine what his coverage was he would turn to this pamphlet before the hard to decipher certificate of insurance or the master policy.
>
> * * *
>
> "Under these conditions it would be inequitable for the respondent to have sold insurance based on a statement of this simple, less onerous duty and then to enforce a stricter provision later on."[9]

See also the following statements in *Barth* v. *State Farm Fire and Casualty Co.*, 214 Pa. Super. 434, 257 A.2d 671 (1969):

> "The thrust of appellant's argument is that the insurance company led him to rely on the representations made by the insurance brochure, and that the representations should be considered as elements of the contract.
>
> * * *
>
> "For instance in *Coastal States Life Ins. Co.* v. *Raphael* (1966, Fla. App.), 183 So.2d 274, the court affirmed the chancellor's decree that the life insurance policy in question be reformed to include the terms of a prospectus furnished to plaintiff by the insurer's agent, which prospectus, containing provisions for payment or return in somewhat

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[9] 36 A.L.R. 3d at 539, 540.

greater amount than the policy in certain respects, was relied on by the insured.

* * *

"Similarly in *Providential Life Insurance Co.* v. *Clem,* 240 Ark. 922, 403, S.W.2d 68 (1966) the Arkansas Supreme Court held that even though a group policy was available for inspection by the insured, a solicitation pamphlet which stated that the policy would cover a certain loss could not be negated by a specific exclusion in the policy and may be relied upon by the beneficiaries who had purchased the policy to cover their son. The court stated that the phamphlet 'the form of which was prepared by the insurance company, clearly states those things not covered by the policy. The insurance company had no right to add other exclusions to the policy without the approval of the applicant.' "[10]

The District Court made no findings on the fraud count whatever. The only reference, as stated, was this:

". . .[T]he Court considers it only of academic interest (if that) to discuss and compare the several theories plaintiff advances to support tort recovery. Had plaintiff filed this action in a Virginia court such a discussion by the Court would have been of substantial value, especially on appeal to the Supreme Court of Virginia."[11]

The fraud count, however, was separately pleaded, was supported by evidence, and judgment could not be given against Mr. Yow on the count without findings of fact.

The provisions of Rule 52 are plain:

"In all actions tried upon the facts without a jury . . . , the Court shall find the facts specially and

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[10] 257 A.2d at 673, 674.

[11] Appendix, p. 7a.

state separately its conclusions of law thereon. . . ."

This Court, in *Mayo* v. *Lakeland Highlands Canning Co.* 309 U.S. 310, 316 (1940) spoke of the "highest importance" "that there should be a fair compliance with Rule 52(a)." Judge Frank addressed the subject in *United States* v. *Forness,* 125 F.2d 928, 943 (2d Cir. 1942):

> "We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked, 'An unscrupulous administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principles." ' That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards."

The District Court may have felt that the issue of whether the variance between brochure and policy con-

stituted fraud was a case of first impression in Virginia. That may be the meaning of its statement,

> "Had plaintiff filed this action in a Virginia court such a discussion by the Court would have been of substantial value, especially on appeal to the Supreme Court of Virginia."[12]

There has admittedly been no case in Virginia on these facts. But on general principles of fraudulent conduct, the variance between brochure and policy would appear to be fraud of the common or garden variety in Virginia. *McDaniel* v. *Hodges,* 176 Va. 519, 11 S.E.2d 623 (1940); *Jefferson Standard Life Insurance Co.* v. *Hedrick,* 181 Va. 824, 27 S.E.2d 198 (1943). Even if the case were one of first impression,

> "When there is no persuasive state ruling on the question, the federal court must exercise its judgment based upon whatever principles of state law are applicable, or by having recourse to the general rules of law applied according to its own best judgment. . . ." 1A Moore's Federal Practice, Part 2, p. 3121.

Having jurisdiction of the first count, it was obligatory for the District Court to decide it.

> "We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens* v. *Virginia,* 6 Wheat. (19 U.S.) 264, 404 (1821).

The District Court *did* render judgment on the first count. But it did so without making findings of fact.

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[12] Appendix, p. 7a.

## CONCLUSION

The Reverend Mr. Yow was denied the insurance benefits to which he was entitled for over three years because of the insurance company's claim that his injury did not result from an accident "directly and independently of all other causes." That language was not in the brochure which impelled him to subscribe to the coverage. It seems incredible that a United States District Court and a United States Court of Appeals should be so insensitive to a patent fraud that the one should make no findings on the issue and the other should sanction the result.

It is respectfully submitted that the circumstances are such as to call for the exercise of the Court's supervisory power, and that the petition should be granted.

T. KEISTER GREER
110 Maple Avenue
Rocky Mount, Virginia 24151
(703) 483-5149

*Counsel of Record*

*Of Counsel:*

William N. Alexander, II
Greer & Alexander

August, 1980

# APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 78-0774-R

Filed September 4, 1979

CARL JAY YOW

v.

AMERICAN HOME ASSURANCE COMPANY

## MEMORANDUM

This is a diversity action grounded upon two interrelated theories of recovery. Plaintiff asserts his right to recover contractual benefits under an accidental dismemberment insurance policy issued by defendant. He also seeks tort recovery and punitive damages for defendant's refusal to pay the contractual sum due. After extensive discovery the parties concluded there were no material issues of fact as to either basis for liability and by pre-trial order they submitted all questions of law and fact to the Court on the record. The question of damages, if liability be found, was reserved for a jury trial.

Plaintiff is a Methodist minister who had been subject to dizzy spells for some time. Despite this disability and despite his fear of injury, he was operating his woodworking saw on the afternoon of 16 March 1976. He was afflicted with a dizzy spell while operating the saw, fell against the saw, and severed his left hand above the wrist Mr. Yow had a policy of insurance with defendant which provided for certain payments upon severence of his hand. He promptly notified defendant of the accident and submitted the requisite proof of loss. Proof of loss was received by defendant on 19 April 1976.

The claim was handled by one Michael Squilante, supervisor in defendant's New York office. He promptly initiated an investigation into the loss seeking to find, among other

things, whether the injury might have been self-inflicted. The investigation showed no evidence that the loss was self-inflicted and this aspect of the matter received no further attention.

Defendant next sought further information as to the nature of the precedent dizzy spells. At the same time he sought a medical opinion as to whether there was "an underlying disease or illness responsible for the dizzy spells." The medical opinion, based on incomplete and less than adequate information furnished by Squilante, was that the fainting spell was "the result of pre-existing disease."

Having obtained further medical information, Squilante sought additional medical advice from the company's medical advisor. Again the advisor reported that "abnormality in the brain" would account for the dizzy spells. The medical advisor's evaluation of the medical reports sent to him improperly interpreted a "suggestion" of brain abnormality as a diagnosis of abnormality. In fact, the examing physician had found that the dizzy spells were "transient functional rather than stable or chronic . . . .

Having thus obtained erroneous medical advice, Squilante sent a memorandum to a New York lawyer, outside counsel, asking his legal opinion on the following question:

> John, This is a claim for dismemberment benefit. Loss of left hand, $150,000. Enclosed is our entire claim file. He had dizzy spell while using a power saw at home. Fell into saw and severed hand, one centimeter proximal to distal end of radius taken to hospital and hand reattached or re-implanted. (This is the non-dominant hand) with satisfactory results. If all goes well, MD says the most he will be able to do is open and close the hand and pick up large objects — could never use it for fine movement.
>
> Please review question of accident directly and independently of all other causes and whether he has sus-

tained loss of hand under the policy provisions. Regards, M.A. Squilante.

This request for a legal opinion was sent on 18 May 1976. On 14 July 1976 counsel reported by telephone to the company that his opinion was "leaning towards this being payable." In response to this report the company set up a 50% reserve.

In his written opinion of 15 July 1976 outside counsel noted that there was no case in point in Virginia and that there was a diversity in the precedents in the several states. He also noted that:

> Virginia is a rather conservative State as to accidental loss. While there is no case that holds that a dizzy spell which causes the fall will prevent an accidental loss, the cases that are on the books in Virginia are quite conservative.
>
> * * *
>
> The cause of the fainting spells is important. If the spells themselves are tantamount to a disease or if they are clearly caused by disease, the general rule is to the effect that the injury received in a fall caused by disease is not an accident directly and independently of all other causes. Not every State will follow this line of reasoning. Since Virginia has no case on point all we can do is look to the general rule.
>
> * * *
>
> It is my belief that Virginia is quite conservative and that we would have a better than even chance of having them follow the general rule. Our chances would be enhanced, however, if we could determine that the fainting spells were caused by disease rather than a momentary indisposition or some temporary weakness. In all events, this case will have high settlement value. Since there is no case in point, the fact that the injury was received as a

result of a fainting spell should be sufficient to enable the company to properly defend. It will present a case of novel impression in Virginia. As much information as possible should be obtained concerning the nature and origin of the fainting spells.

Despite this suggestion by outside counsel, Squilante made no further effort to determine whether the recurring dizzy spells were a result of "disease" though the treating physicians had by this time concluded the dizzy spells were not the result of disease.

Having received the advice of counsel, Squilante and his superior met on 6 August 1976 and determined that they should deny the claim and prepare to defend it. Accordingly, on 11 August 1976 Squilante wrote Mr. Yow, called his attention to the fact that any loss under the policy must result "directly and independently of all other causes" and advised him that no benefits were payable under the policy terms.

Approximately a month later Mr. Yow responded by saying that he was "shocked" that his claim was denied. He offered to provide any further information and requested a reconsideration. Squilante did not receive this letter but on 28 January 1977 Mr. Yow wrote again specifically stating that "no evidence of disease was found." He requested a prompt reconsideration and advice. Squilante replied on 17 February 1977 stating he had "no alternative but to reiterate our company's position as set forth in our letter of denial of August 11, 1976."

Despite the fact that Mr. Yow's letter of 28 January 1977 specifically pointed out that no disease had been found, and dispite the fact that outside counsel considered that disease *vel non* was an "enhancing" factor, Mr. Squilante did not refer the matter to outside counsel for further evaluation. Nor did he point out to Mr. Yow that the denial was based specifically upon the assumption that the dizzy spell was a result of a pre-existing disease

No further activity between the parties took place until after an action on the policy was filed on 15 March 1978 in the United States District Court for the Western District of Virginia.[1] Upon the filing of the action defendant offered $90,000.00 in full settlement. This offer was rejected. Since this Court is both trier of law and fact, further offers at settlement, if any, have not been communicated to the Court. However it is noted that upon the Court advising counsel that summary judgment would enter for plaintiff on the contract, defendant tendered what it claimed to be full payment under the policy to plaintiff.

The above findings of fact are uncontested. The findings are essentially taken from plaintiff's version as set forth in his brief in support of his motion for summary judgment. There is a further finding of fact which is pertinant to the inquiry.

As is evidenced by the Court's ruling on plaintiff's motion for summary judgment on the contract, the Court has concluded that outside counsel was wrong in his view of Virginia law as to policy liability.[2] Indeed, it is the Court's view that the loss suffered would uniformly be found compensible among the United States and in Great Britian. The cases so finding are based on the holding and the inescapable logic in *Lawrence* v. *The Accidental Ins. Co., L.R.,* 7 Q.B.Div. 216 (1881) where it was said:

> It were infinite for the law to consider the causes of causes, and their impulsions one of another. Therefore it contenteth itself with the immediate cause.

That this is the Virginia view is supported by *Mutual Life Ins. Co.* v. *Dodge,* 11 F.2d 486 (4th Cir. 1926); *Newsoms* v. *Commercial Cas. Ins. Co.,* 147 Va. 471, 476, 137 S.E. 456 (1927; *American Nat. Ins. Co.* v. *Belch,* 100 F.2d 48 (4th Cir. 1938); and *John Hancock Mut. Life Ins. Co.* v. *Crack,* 216

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[1] This action was subsequently dismissed without prejudice.

[2] Plaintiff's brief on this point was one of the better expositions of a point of law filed with this judge.

F.2d 805 (4th Cir. 1954). The Court, then finds as a fact that defendent received erroneous legal advice as to the propriety of a defense to the policy claim.

Having found the foregoing facts the Court must determine whether, in addition to the policy claim, plaintiff is entitled under Virginia law to a recovery for a tortious failure to pay under the terms of an insurance policy. The Court has studied the briefs of counsel and concludes that there is no settled precedent directly on point decided by the Supreme Court of Virginia. Judge Merhige, for this Court but deciding Virginia law, concluded in *Carter* v. *Hartford Accident & Indemnity Co.*, 423 F.Supp. 827, 830 (E.D. Va. 1976) that, "a tort action will lie against an insurance company for a wrongful refusal to make payments due only upon a showing of malice, wantonness or oppression." The closest Virginia authority on point is *Wright* v. *Everett*, 197 Va. 608, 615, 90 S.E.2d 855, 960 (1956) where the Court stated in *dicta*:

> In addition, we have held that even though the foundation of the action arose out of privity of contract between the parties, if the same alleged facts shows a breach of duty constituting a tortious neglect, plaintiff has a right to elect whether he will proceed in tort or assumpsit.

Though the Supreme Court of Virginia and the federal courts use such language of liability no court has ever applied Virginia law to the end that plaintiff recover under such a theory. An annotation on point is contained in 47 A.L.R.3rd 314. That annotation, dated in 1973, as well as the later case service, cites no Virginia case on point. Indeed, the quoted portion of *Wright* v. *Everett* indicates that if a plaintiff seeks to take advantage of his tort claim he must first waive his right to proceed in contract. Such a state of the law would not be inconsistent with Virginia's traditional approach that one is entitled to no more than what he bargains for.

Though the opinion in *Carter* v. *Hartford Accident & Indemnity Co., supra,* did not set forth the reasoning suppor-

ting Judge Merhige's conclusion that a Virginia tort claim exists for a "wrongful refusal to make payments due" his reasoning to that end was supported in an earlier unpublished opinion in that case. On the strength of Judge Merhige's opinion this court will assume the existence of such a cause of action.[3]

Having made that assumption, however, the Court finds that the facts simply do not support a conclusion of "malice, wantonness, or oppression."

It must be recognized that the substantial weight of authority is that payment under the contract was due whether or not Mr. Yow suffered his loss as a result of a dizzy spell consequent to a disease. The reason for this is simple. The disease did not cause his hand to drop off. The accident did.

Nevertheless, the facts found simply do not support any element of maliciousness. Indeed, there appears to be no animus whatever. Defendant obviously was mistaken in its refusal to make payment under the policy but a mistake, even a stupid mistake, is not proof of malice.

Wantonness denotes recklessness, unrestrained cruelty or brutality. While Squilante, his medical advisor, and his legal advisor, did not handle this claim well, in no wise can it be concluded that they handled it with wantonness. And although the consequences to Mr. Yow from the loss of his hand coupled with defendant's failure to pay have been lamentable, it cannot be said that defendant has behaved toward Mr. Yow in an oppressive manner. Oppressiveness connotes an intent and purpose to press one down while the conduct of defendant merely indicates a desire to save the

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[3] Having made this assumption, the Court considers it only of academic interest (if that) to discuss and compare the several theories plaintiff advances to support tort recovery. Had plaintiff filed this action in a Virginia court such a discussion by the Court would have been of substantial value, especially on appeal to the Supreme Court of Virginia.

company money in what was erroneously considered to be a doubtful case.

The Court must conclude, then, that even if Virginia recognizes the tort pressed by plaintiff, plaintiff has not proved that defendant's refusal to pay was grounded upon malice, wantonness or oppressive conduct. It follows that no tort nor punitive damages are recoverable in this case. Judgment must enter for defendant on counts one, two, three, and four of the complaint. Judgment shall enter for plaintiff on count five insofar as count five seeks damages under the contract. Plaintiff shall recover his costs. An appropriate order shall issue.

/s/ D. DORTCH WARRINER
D. Dortch Warriner
*United States*
*District Judge*

Date: 4 September 1979

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1648

CARL JAY YOW, *Appellant,*

v.

AMERICAN HOME ASSURANCE COMPANY,
a New York Corporation, *Appellee.*

---

**Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.**
**D. Dortch Warriner, District Judge.**

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Argued May 7, 1980 Decided May 28, 1980

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Before HAYNSWORTH, *Chief Judge,* BUTZNER, *Circuit Judge,* and FIELD, *Senior Circuit Judge.*

---

T. Keister Greer (W.N. Alexander, II, Greer and Alexander on brief) for Appellant; William B. Poff (Richard M. Thomas, Woods, Rogers, Muse, Walker & Thornton on brief) for Appellee.

**PER CURIAM**

This diversity action is based upon an insurance company's failure to settle a claim with its insured. With respect to liability, the parties waived jury trial. The district court held that the insurance company was liable for the face amount of the contract, but that the facts did not warrant a finding of liability under plaintiff's various tort claims. The district court's factual findings were not clearly erroneous and we find no error in the application of Virginia law to those facts. The facts found by the district court simply do not warrant an award of exemplary or punitive damages.

**AFFIRMED**

## FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

### Rule 52. Findings by the Court.

(a) Effects. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional fundings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-282

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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CARL JAY YOW, *Petitioner*,

v.

AMERICAN HOME ASSURANCE COMPANY,
a New York Corporation, *Respondent*.

---

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

William B. Poff
Woods, Rogers, Muse, Walker
& Thornton
105 Franklin Road, S. W.
P. O. Box 720
Roanoke, VA 24004
(703) 982-4249

*Counsel of Record*

*Of Counsel:*

RICHARD M. THOMAS
WOODS, ROGERS, MUSE,
WALKER & THORNTON

September, 1980

ART PRINTING CO., ROANOKE, VA.

## THE QUESTION PRESENTED

Whether the entry of summary judgment by a United States District Court without findings of fact is permissible under Rule 52, Federal Rules of Civil Procedure, and therefore does not warrant the exercise of supervisory power by this Court.

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OCTOBER TERM, 1980

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**BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

---

**FEDERAL RULES OF CIVIL PROCEDURE INVOLVED**

Rule 52, F.R.C.P. [Text appended hereto].
Rule 61, F.R.C.P. [Text appended hereto].

## STATEMENT OF THE CASE

Plaintiff-Petitioner, Carl Jay Yow, participated in a group insurance policy issued by Defendant-Respondent American Home Assurance Company (hereafter "American Home"). The policy provided coverage for certain losses resulting from injury, which was defined in the policy as "bodily injury caused by an accident. . .and resulting directly and independently of all other causes in loss . . . ." The policy specifically excluded coverage for losses caused by or resulting from disease of any kind.

Petitioner, while operating a power saw, experienced a dizzy spell and fell against the saw, severing his left hand. American Home, after a thorough investigation of the facts, and in reliance on the opinion of its medical director and the advice of outside legal counsel, determined that the claim did not fall within the scope of its coverage and that no benefits were payable.

Petitioner filed an action in the United States District Court for the Western District of Virginia, seeking judgment for breach of contract in the amount of $150,000, the amount payable under the contract for severance of a hand. After the failure of settlement negotiations, during which American Home offered to compromise the claim for a payment of $90,000, Petitioner voluntarily dismissed that action and instituted a broader suit seeking compensatory and punitive damages (in the amount of $1,000,000 each) on five different legal theories, one in contract and four in tort.

After extensive discovery the parties concluded there were no material issues of fact as to either contractual or tort theories of liability. After filing motions for summary judgment, the parties submitted all questions of law and fact to the Court on the record by pretrial order entered July 2, 1979. Appendix, page 1a. That order contained the stipulation that there were "no material issues of fact as to liability (a) on the certificate of insurance; and (b) on the four causes of action alleged by plaintiff in addition to his claim for the policy benefits. . . ."

The District Court found in favor of Petitioner on the issue of contractual liability and notified counsel by letter that summary judgment would enter for the Petitioner on the contract. Upon receipt of that notice, American Home tendered to Petitioner the sum of $180,000, which constituted the amount due under the insurance policy plus interest.

After full review of the record, the District Court denied Petitioner any recovery in tort and entered judgment in favor of American Home. Appendix, page 2a.

Petitioner appealed the decision, stating in his notice of appeal that the appeal was "from that portion of the final judgment which denied his claims *ex delicto*." Petitioner made no objection to any failure on the part of the District Court to make findings of fact as to his tort claim for fraud. The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court. Appendix, page 11a. From that decision, Petitioner now seeks certiorari.

**REASONS FOR DENYING THE WRIT**

I THE DECISION OF THE DISTRICT COURT WAS A GRANT OF SUMMARY JUDGMENT, FOR WHICH NO FINDINGS OF FACT OR CONCLUSIONS OF LAW ARE NECESSARY.

II. ANY ERROR RESULTING FROM FAILURE OF THE DISTRICT COURT TO MAKE FINDINGS OF FACT WITH RESPECT TO PETITIONER'S FRAUD CLAIM WAS HARMLESS ERROR.

* * *

I THE DECISION OF THE DISTRICT COURT WAS A GRANT OF SUMMARY JUDGMENT, FOR WHICH NO FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NECESSARY.

Rule 52, Federal Rules of Civil Procedure, provides in pertinent part, "[F]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." Rule 56, Federal Rules of Civil Procedure, provides for the granting of summary judgment where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 41, Federal Rules of Civil Procedure, pertains to dismissal of actions and has no application in this case.

Both parties moved for summary judgment in the District Court. By pretrial order dated July 2, 1979, the parties submitted all questions of law and fact to the Court on the record. They agreed that there were no material issues of fact as to liability either on Petitioner's claim for contract benefits or on his four alleged causes of action in tort. The District Court issued its judgment order on September 4, 1979, with an accompanying memorandum opinion, finding for Petitioner on his claim for contractual recovery, and for American Home on Petitioner's tort claims. In his memorandum opinion, Judge Warriner made it clear that the case was being decided upon the opposing motions for summary judgment by referring to "the Court's ruling on plaintiff's motion for summary judgment on the contract. . . ." Appendix, page 7a.

Indeed, the procedure followed by the parties throughout makes it manifest that the case was submitted to the Court for summary judgment. As reflected in the pretrial order, all issues of law and fact were submitted to the Court on the record. There was no trial; no witnesses were heard by the Court; and no evidence was taken. Rather, the case was submitted for decision on the record, which consisted of 11 depositions, more than 100 exhibits, and the responses to interrogatories, requests for admissions and requests for production of documents. The facts being undisputed, the case was appropriate for summary judgment, and it was so submitted and so decided.

As the decision of this case was a decision of motions under Rule 56, Federal Rules of Civil Procedure, findings of fact and conclusions of law are unnecessary. Rule 52, Federal Rules of Civil Procedure. Indeed, findings of fact would be superfluous, because the parties had stipulated in the pretrial order that there were no material issues of fact as to liability. *Jones* v. *New York Central Railroad Company*, 182 F.2d 326 (6th Cir. 1950). The cases cited by Petitioner as requiring findngs of facts, *Mayo* v. *Lakeland*

*Highlands Canning Company, Inc.*, 309 U. S. 310 (1940) and *United States* v. *Forness*, 125 F.2d 928 (2d Cir. 1942), are inapposite, as they involved contested issues of fact not appropriate for summary judgment. As Petitioner's counsel stated at page 6 in his reply brief for the Court of Appeals, "this appellant has no quarrel with any of the District Court's findings of facts. The case, after all, was submitted for decision on a stipulated order that there were 'no material issues of fact.' " Under such circumstances, the alleged absence of specific findings of fact as to Petitioner's fraud claim does not constitute a ground for the granting of the petition for writ of certiorari.

## II. ANY ERROR RESULTING FROM FAILURE OF THE DISTRICT COURT TO MAKE FINDINGS OF FACT WITH RESPECT TO PETITIONER'S FRAUD CLAIM WAS HARMLESS ERROR.

Rule 61, Federal Rules of Civil Procedure, provides that no error or defect in any ruling or order is ground for disturbing a judgment unless refusal to do so appears to the court inconsistent with substantial justice. Any error or defect which does not affect the substantial rights of the parties is to be disregarded. Even if the absence of findings of fact by the District Court were to be deemed error, there has been no effect on the substantial rights of the parties, and any such error is therefore harmless.

Petitioner has raised for the first time in his petition for writ of certiorari the question of whether findings of fact should have been made by the District Court. At no prior point in the proceedings has Petitioner challenged that aspect of the District Court's decision. Indeed, in Petitioner's initial brief before the Court of Appeals, he stated as the three issues presented for review whether, on the record, the insurance company was liable for damages (1) for defrauding Petitioner, (2) for intentional infliction of emotional stress, and (3) for bad faith refusal to pay policy benefits. In the brief, reply brief, and in oral argument, Petitioner

argued vigorously that he was entitled to recover on those three grounds. Petitioner specifically addressed the issue of findings of fact in his reply brief at page 6:

> This appellant has no quarrel with any the District Court's findings of facts. The case, after all, was submitted for decision on a stipulated order that there were "no material issues of fact."

More tellingly, at page 15 of the reply brief, it is stated:

> The District Court made no findings as to fraud. No remand for such findings is necessary. The evidence with respect thereto is largely documentary, in the record, and undisputed.

Having thus ratified the District Court's treatment of findings of fact, Petitioner should not now be permitted to challenge the decision of the District Court for failure to make findings of fact as to his fraud claim, nor should he be permitted to challenge the decision of the Court of Appeals as "sanctioning" that alleged failure.

Throughout the course of this litigation, the parties and the Courts have treated all of Petitioner's alleged tort theories of recovery together and have dealt separately with the issue of contractual recovery. This treatment is reflected in the stipulated pretrial order of July 2, 1979 (Appendix, page 1a); the judgment order and opinion dated September 4, 1979 (Appendix, pages 2a, 3a); and in the briefs and arguments of the parties submitted below. Since this procedure was acquiesced in, even encouraged, by Petitioner's counsel, he should not now be heard to object. Petitioner has had every opportunity to assert his cause. Since undisputed facts were before both the District Court and the Court of Appeals by virtue of an order which stipulated that there were no material issues of fact as to liability, there was no reason for either court below to make findings of fact. The District Court found that on the undisputed facts, under Virginia law, Petitioner had not proved any entitlement to

tort or punitive damages. The Court of Appeals found no error in either the factual findings made by the District Court or in its application of Virginia law. Petitioner, having first ratified the District Court's position with respect to findings of fact, now seeks to challenge that position and obtain further adjudication upon the facts of the case. Since the conduct of neither the District Court nor the Court of Appeals serves to deprive Petitioner of substantial justice, any error which may have occurred is harmless and must be disregarded. Rule 61, Federal Rules of Civil Procedure.

## CONCLUSION

Petitioner has sought review on a writ of certiorari on the grounds that this Court should exercise its supervisory power because the District Court rendered judgment without making findings of fact. Rule 17 of the Rules of the Supreme Court of the United States provides for the exercise of such supervisory power only where a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision. The record, however, amply demonstrates that no such departure has occurred here. No findings of fact as to the fraud claim were necessary because the matter was submitted to the Court on the motion for summary judgment with a stipulation that no material issues of fact existed. Moreover, even if the lack of findings of fact by the District Court could be said to constitute error, such error was harmless and would provide no basis for the exercise of this Court's supervisory powers.

Respondent American Home Assurance Company therefore respectfully requests that the petition for writ of certiorari be denied.

William B. Poff
Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S. W.
P. O. Box 720
Roanoke, VA 24004
(703) 982-4249

Counsel of Record

Of Counsel:

Richard M. Thomas
Woods, Rogers, Muse, Walker & Thornton

September, 1980

# APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 78-0774-R

Filed July 2, 1979

CARL J. YOW

v.

AMERICAN HOME ASSURANCE COMPANY,
A NEW YORK CORPORATION

The parties, by counsel, having agreed:

(1) That there are no material issues of fact as to liability (a) on the certificate of insurance; and (b) on the four causes of action alleged by plaintiff in addition to his claim for the policy benefits;

(2) that the parties waive trial by jury as to liability and agree to submit all questions of law and fact to the Court on the record presently before the Court; and

(3) that all objections to proffered exhibits on liability are waived, leaving to the Court to decide the weight, if any, to be given to such exhibits,

It is accordingly ORDERED that (A) the trial now scheduled for July 10, 1979, is removed from the trial docket; and (B) that all issues of damages are reserved for trial by jury if necessary.

Enter this 2nd day of July, 1979
/S/ D. Dortch Warriner
Judge

Seen and agreed to:

/S/ T. Keister Greer
Of Counsel for plaintiff

/S/ William B. Poff
Of Counsel for defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 78-0774-R

Filed September 4, 1979

CARL J. YOW

v.

AMERICAN HOME ASSURANCE COMPANY,
A NEW YORK CORPORATION

## JUDGMENT

For the reasons set forth in the accompanying memorandum the Court finds for plaintiff against defendant on his claim *ex contractu* and for defendant against plaintiff on plaintiff's claims *ex delicto*. Defendant having heretofore tendered to plaintiff the sum of $180,000, with interest, in payment of its contractual liability, it is the judgment of the Court that plaintiff recover nothing of defendant except plaintiff's costs in this behalf expended.

And this is the final judgment of the Court.

Let the Clerk send a copy of this order and the accompanying memorandum to counsel of record.

D. Dortch Warriner
United States District Judge

September 4, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 78-0774-R

Filed September 4, 1979

CARL J. YOW

v.

AMERICAN HOME ASSURANCE COMPANY

## MEMORANDUM

This is a diversity action grounded upon two interrelated theories of recovery. Plaintiff asserts his right to recover contractual benefits under an accidental dismemberment insurance policy issued by defendant. He also seeks tort recovery and punitive damages for defendant's refusal to pay the contractual sum due. After extensive discovery the parties concluded there were no material issues of fact as to either basis for liability and by pre-trial order they submitted all questions of law and fact to the Court on the record. The question of damages, if liability be found, was reserved for a jury trial.

Plaintiff is a Methodist minister who had been subject to dizzy spells for some time. Despite this disability and despite his fear of injury, he was operating his woodworking saw on the afternoon of 16 March 1976. He was afflicted with a dizzy spell while operating the saw, fell against the saw, and severed his left hand above the wrist. Mr. Yow had a policy of insurance with defendant which provided for certain payments upon severance of his hand. He promptly notified defendant of the accident and submitted the requisite proof of loss. Proof of loss was received by defendant on 19 April 1976.

The claim was handled by one Michael Squilante, supervisor in defendant's New York office. He promptly initiated an investigation into the loss seeking to find, among other things, whether the injury might have been self-inflicted. The investigation showed no evidence that the loss was self-inflicted and this aspect of the matter received no further attention.

Defendant next sought further information as to the nature of the precedent dizzy spells. At the same time he sought a medical opinion as to whether there was "an underlying disease or illness responsible for the dizzy spells." The medical opinion, based on incomplete and less than adequate information furnished by Squilante, was that the fainting spell was "the result of pre-existing disease."

Having obtained further medical information, Squilante sought additional medical advice from the company's medical advisor. Again the advisor reported that "abnormality in the brain" would account for the dizzy spells. The medical advisor's evaluation of the medical reports sent to him improperly interpreted a "suggestion" of brain abnormality as a diagnosis of abnormality. In fact, the examining physician had found that the dizzy spells were "transient functional rather than stable or chronic . . . ."

Having thus obtained erroneous medical advice, Squilante sent a memorandum to a New York lawyer, outside counsel, asking his legal opinion on the following question:

> John, This is a claim for dismemberment benefit. Loss of left hand, $150,000. Enclosed is our entire claim file. He had dizzy spell while using a power saw at home. Fell into saw and severed hand, one centimeter proximal to distal end of radius taken to hospital and hand re-attached or re-implanted. (This is the non-dominant hand) with satisfactory results. If all goes

> well, MD says the most he will be able to do is open and close the hand and pick up large objects—could never use it for fine movement.
>
> Please review question of accident directly and independently of all other causes and whether he has sustained loss of hand under the policy provisions. Regards, M. A. Squilante.

This request for a legal opinion was sent on 18 May 1976. On 14 July 1976 counsel reported by telephone to the company that his opinion was "leaning towards this being payable." In response to this report the company set up a 50% reserve.

In his written opinion of 15 July 1976 outside counsel noted that there was no case in point in Virginia and that there was a diversity in the precedents in the several states. He also noted that:

> Virginia is a rather conservative State as to accidental loss. While there is no case that holds that a dizzy spell which causes the fall will prevent an accidental loss, the cases that are on the books in Virginia are quite conservative.
>
> * * *
>
> The cause of the fainting spells is important. If the spells themselves are tantamount to a disease or if they are clearly caused by disease, the general rule is to the effect that the injury received in a fall caused by disease is not an accident directly and independently of all other causes. Not every State will follow this line of reasoning. Since Virginia has no case on point all we can do is look to the general rule.
>
> * * *
>
> It is my belief that Virginia is quite conservative and that we would have a better than even chance of having them follow the general rule. Our chances would be

> enhanced, however, if we could determine that the fainting spells were caused by disease rather than a momentary indisposition or some temporary weakness. In all events, this case will have high settlement value. Since there is no case in point, the fact that the injury was received as a result of a fainting spell should be sufficient to enable the company to properly defend. It will present a case of novel impression in Virginia. As much information as possible should be obtained concerning the nature and origin of the fainting spells.

Despite this suggestion by outside counsel, Squilante made no further effort to determine whether the recurring dizzy spells were a result of "disease" though the treating physicians had by this time concluded the dizzy spells were not the result of disease.

Having received the advice of counsel, Squilante and his superior met on 6 August 1976 and determined that they should deny the claim and prepare to defend it. Accordingly, on 11 August 1976 Squilante wrote Mr. Yow, called his attention to the fact that any loss under the policy must result "directly and independently of all other causes" and advised him that no benefits were payable under the policy terms.

Approximately a month later Mr. Yow responded by saying that he was "shocked" that his claim was denied. He offered to provide any further information and requested a reconsideration. Squilante did not receive this letter but on 28 January 1977 Mr. Yow wrote again specifically stating that "no evidence of disease was found." He requested a prompt reconsideration and advice. Squilante replied on 17 February 1977 stating he had "no alternative but to reiterate our company's position as set forth in our letter of denial of August 11, 1976."

Despite the fact that Mr. Yow's letter of 28 January 1977 specifically pointed out that no disease had been found, and dispite [sic] the fact that outside counsel consid-

ered that disease *vel non* was an "enhancing" factor, Mr. Squilante did not re-refer the matter to outside counsel for further evaluation. Nor did he point out to Mr. Yow that the denial was based specifically upon the assumption that the dizzy spell was a result of a pre-existing disease.

No further activity between the parties took place until after an action on the policy was filed on 15 March 1978 in the United States District Court for the Western District of Virginia.[1] Upon the filing of the action defendant offered $90,000.00 in full settlement. This offer was rejected. Since this Court is both trier of law and fact, further offers at settlement, if any, have not been communicated to the Court. However it is noted that upon the Court advising counsel that summary judgment would enter for plaintiff on the contract, defendant tendered what it claimed to be full payment under the policy to plaintiff.

The above findings of fact are uncontested. The findings are essentially taken from plaintiff's version as set forth in his brief in support of his motion for summary judgment. There is a further finding of fact which is pertinent to the inquiry.

As is evidenced by the Court's ruling on plaintiff's motion for summary judgment on the contract, the Court has concluded that outside counsel was wrong in his view of Virginia law as to policy liability.[2] Indeed, it is the Court's view that the loss suffered would uniformly be found compensible among the United States and in Great Britian [sic]. The cases so finding are based on the holding and the inescapable logic in *Lawrence v. The Accidental Ins. Co., L.R.*, 7 Q.B.Div. 216 (1881) where it was said:

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[1] This action was subsequently dismissed without prejudice.

[2] Plaintiff's brief on this point was one of the better expositions of a point of law filed with this judge.

> It were infinite for the law to consider the causes of causes, and their impulsions one of another. Therefore it contenteth itself with the immediate cause.

That this is the Virginia view is supported by *Mutual Life Ins. Co. v. Dodge*, 11 F.2d 486 (4th Cir. 1926); *Newsoms v. Commercial Cas. Ins. Co.*, 147 Va. 471, 476, 137 S.E. 456 (1927; *American Nat. Ins. Co. v. Belch*, 100 F.2d 48 (4th Cir. 1938); and *John Hancock Mut. Life Ins. Co. v. Crack*, 216 F.2d 805 (4th Cir. 1954). The Court, then, finds as a fact that defendent [sic] received erroneous legal advice as to the propriety of a defense to the policy claim.

Having found the foregoing facts the Court must determine whether, in addition to the policy claim, plaintiff is entitled under Virginia law to a recovery for a tortious failure to pay under the terms of an insurance policy. The Court has studied the briefs of counsel and concludes that there is no settled precedent directly on point decided by the Supreme Court of Virginia. Judge Merhige for this Court but deciding Virginia law, concluded in *Carter v. Hartford Accident & Indemnity Co.*, 423 F.Supp. 827, 830 (E.D. Va. 1976) that, "a tort action will lie against an insurance company for a wrongful refusal to make payments due only upon a showing of malice, wantonness or oppression." The closest Virginia authority on point is *Wright v. Everett*, 197 Va. 608, 615, 90 S.E.2d 855, 960 (1956) where the Court stated in *dicta:*

> In addition, we have held that even though the foundation of the action arose out of privity of contract between the parties, if the same alleged facts show a breach of duty constituting a tortious neglect, plaintiff has a right to elect whether he will proceed in tort or assumpsit.

Though the Supreme Court of Virginia and the federal courts use such language of liability no court has ever applied Virginia law to the end that plaintiff recover

under such a theory. An annotation on point is contained in 47 A.L.R.3rd 314. That annotation, dated in 1973, as well as the later case service, cites no Virginia case on point. Indeed, the quoted portion of *Wright v. Everett* indicated that if a plaintiff seeks to take advantage of his tort claim he must first waive his right to proceed in contract. Such a state of the law would not be inconsistent with Virginia's traditional approach that one is entitled to no more than what he bargains for.

Though the opinion in *Carter v. Hartford Accident & Indemnity Co., supra,* did not set forth the reasoning supporting Judge Merhige's conclusion that a Virginia tort claim exists for a "wrongful refusal to make payments due" his reasoning to that end was supported in an earlier unpublished opinion in that case. On the strength of Judge Merhige's opinion this Court will assume the existence of such a cause of action.[3]

Having made that assumption, however, the Court finds that the facts simply do not support a conclusion of "malice, wantonness, or oppression."

It must be recognized that the substantial weight of authority is that payment under the contract was due whether or not Mr. Yow suffered his loss as a result of a dizzy spell consequent to a disease. The reason for this is simple. The disease did not cause his hand to drop off. The accident did.

Nevertheless, the facts found simply do not support any element of maliciousness. Indeed, there appears to be

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[3] Having made this assumption, the Court considers it only of academic interest (if that) to discuss and compare the several theories plaintiff advances to support tort recovery. Had plaintiff filed this action in a Virginia court such a discussion by the Court would have been of substantial value, especially on appeal to the Supreme Court of Virginia.

no animus whatever. Defendant obviously was mistaken in its refusal to make payment under the policy but a mistake, even a stupid mistake, is not proof of malice.

Wantonness denotes recklessness, unrestrained cruelty or brutality. While Squilante, his medical advisor, and his legal advisor, did not handle this claim well, in no wise can it be concluded that they handled it with wantonness. And although the consequences to Mr. Yow from the loss of his hand coupled with defendant's failure to pay have been lamentable, it cannot be said that defendant has behaved toward Mr. Yow in an oppressive manner. Oppressiveness connotes an intent and purpose to press one down while the conduct of defendant merely indicates a desire to save the company money in what was erroneously considered to be a doubtful case.

The court must conclude, then, that even if Virginia recognizes the tort pressed by plaintiff, plaintiff has not proved that defendant's refusal to pay was grounded upon malice, wantonness or oppressive conduct. It follows that no tort nor punitive damages are recoverable in this case. Judgment must enter for defendant on counts one, two, three, and four of the complaint. Judgment shall enter for plaintiff on count five insofar as count five seeks damages under the contract. Plaintiff shall recover his costs. An appropriate order shall issue.

D. Dortch Warriner
United States District Judge.

4 September 1979

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1648

CARL JAY YOW, *Appellant*,

v.

AMERICAN HOME ASSURANCE COMPANY,
a New York Corporation, *Appellee*.

**Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
D. Dortch Warriner, District Judge.**

Argued May 7, 1980 Decided May 28, 1980

Before HAYNSWORTH, *Chief Judge*,
BUTZNER, *Circuit Judge*,
and FIELD, *Senior Circuit Judge*.

T. Keister Greer (W. N. Alexander, II, Greer and Alexander on brief) for Appellant; William B. Poff (Richard M. Thomas, Woods, Rogers, Muse, Walker & Thornton on brief) for Appellee.

**PER CURIAM:**

This diversity action is based upon an insurance company's failure to settle a claim with its insured. With respect to liability, the parties waived jury trial. The district court held that the insurance company was liable for the face amount of the contract, but that the facts did not warrant a finding of liability under plaintiff's various tort claims. The district court's factual findings were not clearly erroneous and we find no error in the application of Virginia law to those facts. The facts found by the district court simply do not warrant an award of exemplary or punitive damages.

**AFFIRMED.**

## FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

### Rule 52.

### FINDINGS BY THE COURT

**(a) Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

**(b) Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the quesion of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

## Rule 61.

## HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Supreme Court, U. S.
FILED
OCT 7 1980
MICHAEL RODAK, JR., CLERK

No. 80-282

IN THE

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OCTOBER TERM, 1980

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a New York Corporation, *Respondent.*

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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T. KEISTER GREER
110 Maple Avenue
Rocky Mount, Virginia 24151
(703) 483-5149

*Counsel of Record*

*Of Counsel:*

WILLIAM N. ALEXANDER, II
GREER & ALEXANDER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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No. 80-282

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CARL JAY YOW, *Petitioner,*

v.

AMERICAN HOME ASSURANCE COMPANY,
a New York Corporation, *Respondent.*

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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### REASONS FOR GRANTING THE WRIT

The surprising claim is made in the brief opposing certiorari that the decision of the District Court

"was a grant of summary judgment."[1]

This is quite wrong. The case was submitted to the District Court for decision on eleven depositions and

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[1] Brief of respondent, p. 3.

over a hundred exibits. The very order submitting the case stated that the parties had agreed

> ". . .to submit all questions of law *and fact* to the Court on the record presently before the Court.. . ."[2]

The opinion of the District Court is to the same effect:

> ". . .[T]hey submitted all questions of law *and fact* to the Court on the record."[3]

The District Court continued:

> "Since the Court is both trier of law *and fact*, further offers at settlement, if any, have not been communicated to the Court."[4]

A District Court granting summary judgment decides no factual issues. Nothing is more certain than

> ". . .[T]he court cannot try issues of fact on a Rule 56 motion.. . ."[5]

The District Court did not treat the judgment for defendant as a summary judgment:

> "The Court must conclude, then, that even if Virginia recognizes the tort pressed by plaintiff, plaintiff has not *proved* that defendant's refusal to pay was grounded upon malice, wantonness, or oppressive conduct. It follows that no tort nor punitive damages are recoverable in this case. Judgment must enter for defendant on counts one, two, three, and four of the complaint. Judgment shall enter for plaintiff on count five insofar as count

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[2] Appendix below, p. 26

[3] Appendix to petition for certiorari, p. 1a; emphasis added.

[4] Appendix to petition for certiorari, p. 5a; emphasis added.

[5] 10 Wright and Miller, *Federal Practice and Procedure*, at p. 379.

five seeks damages under the contract. Plaintiff shall recover his costs. An appropriate order shall issue."[6]

The Fourth Circuit did not consider that the District Court's decision had been a summary judgment. The full opinion was as follows:

> "This diversity action is based upon an insurance company's failure to settle a claim with its insured. With respect to liability, the parties waived jury trial. The district court held that the insurance company was liable for the full amount of the contract, but that the facts did not warrant a finding of liability under plaintiff's various tort claims. *The district court's factual findings were not clearly erroneous* and we can find no error in the application of Virginia law to those facts. The facts found by the district court simply do not warrant an award of exemplary or punitive damages."[7]

We are cited by the respondent to *Jones* v. *New York Central Railroad Company*, 182 F.2d 326 (6th Cir. 1950), and told that it is authority for not requiring findings of fact in the case at bar. But as the court stated in *Jones*,

> "The case was tried to the Court without the intervention of a jury *and upon a stipulation of facts.*"[8]

There was no stipulation of facts in the case at bar. There was a record consisting of eleven depositions and over a hundred exhibits. From those materials the District Court found the facts.

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[6] Appendix to petition for certiorari, p. 8a; emphasis added. The District Court had earlier indicated that partial summary judgment would be given plaintiff on the contract. Appendix below, p. 27.

[7] Appendix to petition for certiorari, p. 10a; emphasis added.

[8] 182 F.2d at 327; emphasis added.

The circumstance that a case is submitted on depositions and exhibits does not obviate the requirement of findings. See *Epperson* v. *Connecticut Fire Insurance Co.*, 314 F.2d 486 (10th Cir. 1963), where the case "was tried on depositions only. . . ."[9]; and *Best Medium Publishing Co.* v. *National Insider, Inc.*, 385 F.2d 384 (7th Cir. 1967), where "the only testimony was before the Court by deposition. . . ."[10] In each case the requirement that the District Court make findings of fact was recognized. No authority can be cited for the proposition that findings are not required when a District Court decides a case upon depositions.

The respondent also tells us that the failure to make findings on the fraud claim was not called to the attention of the Fourth Circuit, and that the point is made for the first time to this Court. This is also quite wrong. Petitioner called attention to the District Court's failure to make findings on the fraud count and asked the Fourth Circuit to notice the fraud on the face of the documentary record.

The respondent has quoted from petitioner's reply brief in the Fourth Circuit, as follows:

> "The District Court made no findings as to fraud. No remand for such findings is necessary. The evidence with respect thereto is largely documentary, in the record, and undisputed."

From this we are told that petitioner "thus ratified the District Court's treatment of findings of fact. . . ."[11] This assertion, to put the matter as charitably as possible, is without merit. The full quota-

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[9] 314 F.2d at 491.

[10] 385 F.2d at 386.

[11] Respondent's brief, p. 6.

tion from petitioner's reply brief before the Fourth Circuit was as follows:

> "Reverend Yow's first cause of action in his complaint filed in the District Court was for fraud. The District Court made no findings as to fraud. No remand for such findings is necessary. The evidence with respect thereto is largely documentary, in the record, and undisputed. *McComb* v. *Utica Knitting Co.*, 164 F.2d 670 (2nd Cir. 1947); *King* v. *Comm'n*, 458 F.2d 245 (6th Cir. 1972).

The language from Judge Frank's opinion in *McComb* which petitioner had in mind was this:

* * *

"As that evidence is entirely documentary, no issue of witness' credibility arises; therefore, we can pass on the facts as well as could the trial judge, and need not remand for a finding by him."[12]

The pertinent language from *King* was this:

> "[T]he Commissioner's brief suggests that in the event of a reversal the case should be remanded to the Tax Court for further findings on these issues. However, a remand is unnecessary if all the evidence is documentary and the appellate court can pass upon the facts as well as the trial court, or if all the facts relied upon to support the judgment are in the record and are undisputed. . . ."[13]

A case of similar texture is *Sbicca-Del Mac* v. *Milius Shoe Co.*, 145 F.2d 389 (8th Cir. 1944), where this was said:

> "The trial court made no findings of fact nor conclusions of law, as required by Rule 52(a) of the

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[12] 164 F.2d at 674.

[13] 458 F.2d at 249.

> Rules of Civil Procedure, upon the defenses of ouster and waiver. Since the facts relied upon to support these two defenses are in the record and undisputed we shall not remand the case for this reason alone but will in the exercise of our jurisdiction under such circumstances consider and determine them."[14]

Petitioner did not wish his case to be delayed by remand; the variance between brochure and policy was matter of record.

## CONCLUSION

The District Court rendered judgment on the first count of petitioner's case without making the findings of fact required by Rule 52.[15] The Fourth Circuit affirmed. The fraud count was separately stated and involved different facts from the other counts. The circumstances of an adjudication of a cause of action without making the findings of fact required by Rule 52 are sufficiently extraordinary that this Court should exercise its power of supervision.

Respectfully submitted,

T. KEISTER GREER
110 Maple Avenue
Rocky Mount, Virginia 24151

*Counsel of Record*

*Of Counsel:*

WILLIAM N. ALEXANDER, II
Greer & Alexander

October, 1980

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[14] 145 F.2d at 400.

[15] The omission was deliberate. See appendix to the petition for certiorari, p. 7a.